Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1880

BOARD OF ASSESSORS OF THE
CITY OF BOSTON,
PETITIONER,

v.

NORMAN TREGOR, TRUSTEE,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

WILLIAM F. YORK,
WALTER H. MCLAUGHLIN, SR.,
WALTER H. MCLAUGHLIN, JR.,
MICHAEL EBY,
GILMAN, MCLAUGHLIN &
HANRAHAN,
Ten Post Office Square,
Boston, Massachusetts 02109.
(617) 482-1900
Attorneys for the Petitioner

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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PETITIONER,
v.
NORMAN TREGOR, TRUSTEE,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Introductory Statement.

The City of Boston in the Commonwealth of Massachusetts petitions this Court for a writ of certiorari to review a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is reported at page 770 of

the 1979 Massachusetts Advance Sheets and is appended hereto as Appendix A, pp. 15 through 30.

Jurisdiction.

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on March 23, 1979 and is appended hereto as Appendix A, pp. 15-30. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

Question Presented.

1. Whether the remedy granted by the Supreme Judicial Court to a taxpayer whose real property was assessed at a greater percentage of fair cash value than others in the taxing district, based upon the ratio of assessed value to fair cash value of the lowest substantial class, violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as interpreted by this Court.

Constitutional Provisions and Statutes Involved.

The Fourteenth Amendment to the Constitution of the United States, § 1 states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

In 1976, the respondent, Norman Tregor ("Tregor"), Trustee for the Broad Street Trust, received a real estate tax bill from the petitioner, City of Boston ("City"), in the amount of $86,931.79. Tregor's property was assessed by the City at $320,000 and taxed at a rate of $252.90 per thousand dollars of assessed valuation. After the City denied Tregor's request for an abatement, he appealed to the state Appellate Tax Board[1] ("Board") which conducted a de novo administrative trial. The initial phase of the case dealt with the fair cash value of Tregor's property.[2] Based upon the stipulation of the parties, the Board found its fair cash value to be approximately $320,000.

The second phase of the proceedings, which is the subject of this petition, dealt with the appropriate ratio to be used by the Board in deriving the assessed value of the property upon which the ultimate tax due is calculated. The parties had stipulated that property in the City was assessed in the aggregate below its fair cash value. Since Tregor's tax bill was calculated based upon an assessed value equal to its fair cash value, Tregor was paying taxes at a proportionally higher rate than other taxpayers in the City. Although the parties agreed that Tregor was entitled to an abatement, the actual amount of that abatement was in dispute. The average ratio of assessed value

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[1] The Board is an administrative agency established by the legislature to hear disputes between local taxing authorities and taxpayers. A litigant aggrieved by the Board's decision may appeal directly to the Supreme Judicial Court. Mass. G.L. c. 59, § 65; Mass. G.L. c. 58A, § 13.

[2] The standard to which the tax rate is applied is "fair cash valuation," Mass. G.L. c. 59, § 38, which is defined as "the price that an owner willing but not compelled to sell ought to receive from one willing but not compelled to buy." *Assessors of Quincy* v. *Boston Consolidated Gas Co.*, 309 Mass. 60, 63 (1941).

to fair market value for all property in the City was 50.2%. The ratio of assessed value to fair market value for the class of property comprised of single-family residences was 26.8%. This latter category was, by stipulation, the "lowest substantial class" of property in the City.[3]

Type of Property	Class **	Assessed Value *	Assessment Ratio	Estimated Full Valuation *
Real	R-1	176584	.268	658895
Real	R-2	114028	.380	300073
Real	R-3	106574	.622	171340
Real	R-4	214086	.477	448817
Real	RC	63581	.532	119513
Real	C	657110	.532	1235169
Real	I	174025	.576	302127
Real	A/H	74	1.000	74
Real	L	43399	.415	104576
	Total	1549461	.464	3340584
Estim. 1976 increase		15404	1.000	15404
Personal	Certified	94345	1.000	94345
Personal	Other	149667	1.000	149667
Total		1808877	.502	3,600,000

Class of Property

Residential - single dwelling unit	R1	or	1
Residential - double dwelling units	R2		2
Residential - triple dwelling units	R3		3
Residential - four dwellings units or more	R4		4
Residential/Commercial[1]	RC		5
Commercial[2]	C		6
Industrial[3]	I		7
Classified Agricultural/Horticultural land[4]	AH		8
Other Vacant Land	L		9

1. Residential/Commercial — Commercial property containing one or more dwelling units.
2. Commercial— Property used for retail, service, professional and similar activities.
3. Industrial — Property used for manufacturing, wholesaling and warehousing operations. Also special purpose structures such as fuel storage areas, power plants and telephone exchange buildings.
4. Classified Agricultural/Horticultural Land — Land for which the present use assessment provisions of Chapter 1118 of the Acts of 1973 applies.

Tregor argued before the Board that he was entitled to have his assessed valuation reduced to the level of the lowest substantial class. In opposition, the City argued that Tregor was entitled to have his assessment reduced to the average level of all property in the City. The Board granted Tregor an abatement to the level of the lowest substantial class, but in doing so it expressed the opinion that such an abatement might very well contravene the Fourteenth Amendment to the Constitution of the United States, an issue addressed by the parties in their briefs. The Board stated:

> "In reducing [Tregor's] assessment to reflect the assessment/value ratio of the lowest substantial class, we have followed *Shoppers' World, Inc.* [v. *Board of Assessors of Framingham,* 348 Mass. 366 (1965)], n. 10, [*Board of Assessors of Weymouth* v.] *Curtis,* [Mass. Adv. Sh. (1978) 1676], and *Kavet* [v. *Board of Assessors of Framingham,* 348 Mass. 366 (1965)], . . ., but we have grave reservations, however, based on constitutional considerations both State and Federal, as to whether the rule of those cases is applicable on the record of this appeal" (Appendix B, p. 36).

Later in the opinion, the Board stated:

> "The application of the lowest substantial assessment/value ratio in the facts of this appeal may likewise be violative of the Fourteenth Amendment to the Constitution of the United States. That amendment provides in part that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' Equal protection of the laws requires of course

that all persons in the same category and in the same circumstances be treated alike. See *Opinion of the Justices,* 332 Mass. 769, 779-780. In *Cumberland Coal Co. v. Board of Revision of Tax Assessments,* 284 U.S. 23, at Page 28, the Court said, 'It is established that the intentional systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property.' Conversely, it seem to the Board, that a reduction of a taxpayer's assessment to the lowest substantial assessment/value ratio, when to do so would relieve the taxpayer of a part of his pro rata share of the total tax burden (See *Seigel,* supra), may likewise contravene the constitutional right of others who are assessed at higher percentages of fair cash value on property within the same class as that of such taxpayer'' (Appendix B, pp. 48-49).

Despite these misgivings, Tregor's abatement was substantially in excess of an abatement resulting from an application of the average ratio pertaining to all property in the City.

On appeal, the Supreme Judicial Court affirmed the Board's selection of the ratio of the lowest substantial class as the measure of relief.

> ''[The] remedy [is] an abatement 'which will make the taxpayer's assessment proportional to other assessments, on a basis which reaches results as close as is practicable to those which would have followed application by the assessors of the proper statutory assessment principles.' [*Shoppers' World*] 348 Mass. at 377-378.
>
> ''That conclusion rest[s] in part 'on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' 348 Mass. at 373, quoting *Sioux City Bridge Co.* v. *Dakota County, Neb.,* 260 U.S. 441, 446 (1923). In dictum we added that if, as in the *Bettigole* case, several different percentages had been employed for different classes of property, the same principle 'would logically require reduction of the assessment of a taxpayer against whom there had been discrimination so that such taxpayer's assessment would be porportional to the assessments of the class of property valued at the lowest percentage of fair cash value.' [*Shoppers' World*] 348 Mass. at 377-378 n.10'' (Appendix A, p. 21).

The City submits that the Supreme Judicial Court's selection of the ratio of the lowest substantial class proposed by the respondent is contrary to its expressed goals of uniformity, equality and proportionality first enunciated by this Court in the *Sioux City* case, and, as such warrants review by writ of certiorari.

Reasons for Granting the Writ.

1. The Writ Should Be Granted because the Decision below Contravenes the Equal Protection Clause of the Federal Constitution and Is Contrary to Established Precedent.

The decision of the Massachusetts Supreme Judicial Court dealt exclusively with the problem of remedies for the disproportionately assessed taxpayer. Assuming that the taxpayer can by competent evidence establish that he or she is assessed at a higher proportion of fair cash value than others in the taxing district, then what is the measure of relief? There was agreement on the fact that Tregor

was disproportionately assessed, but the parties proposed two separate measures of relief — the average of the lowest substantial class or the average of all property in the City. The City submits that the constitutionally permissive measure is the average of all property; otherwise, the remedy goes beyond the parameters of equal protection outlined by this Court fifty-six years ago in *Sioux City Bridge Co.* v. *Dakota County, Nebraska,* 260 U.S. 441 (1923), adopted by the Supreme Judicial Court of Massachusetts in *Shoppers' World, Inc.* v. *Board of Assessors of Framingham,* 348 Mass. 366 (1965), and reiterated as the basis for its decision below (Appendix A, p. 15).

Prior to this Court's decision in *Sioux City,* it was a well-established principle of local tax law that a victim of disproportionate assessment practices was not entitled to monetary relief unless he was assessed above fair market value. If his assessment was below fair market value, his only remedy was against other members of his class for the purpose of increasing their taxes to the level of fair market value. *Lowell* v. *County Commrs. of Middlesex,* 152 Mass. 372 (1890); *Sioux City,* supra at 444; *Hillsborough Twp.* v. *Cromwell,* 326 U.S. 620, 624 (1946). In *Sioux City,* the bridge company's property was assessed at one hundred percent of its fair cash value while all other real estate was assessed at fifty-five percent. This Court stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property

> in the same class contravenes the constitutional right of one taxed upon the full value of his property' [*Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350, 352-353 (1918)]. . . . The conclusion in these and other federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district. *This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.* The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Sioux City, supra* at 445, 446 (emphasis supplied).

When the Supreme Judicial Court was first confronted with the question of available remedies for the disproportionately taxed person after the *Sioux City* case, it expressly relied upon this Court's reasoning for its decision granting an abatement to the aggrieved taxpayer. *Shoppers' World,* at 377-378. It stated:

> "If, on all the evidence, such a scheme is established, the taxpayer may be granted an abatement (of the general character suggested in the *Sioux City Bridge Co.* case) which will make the taxpayer's assessment proportional to other assessments,[10] on a basis which reaches results as close as is practicable to those which

would have followed application by the assessors of the proper statutory assessment principles."

"[10] If, as in the *Bettigole* case, 343 Mass. 223, 227, it should be shown that several different percentages of full, fair cash value were employed in valuing different classes of property, the principle discussed in the *Sioux City Bridge Co.* case would logically require reduction of the assessment of a taxpayer against whom there had been discrimination so that such taxpayer's assessment would be proportional to the assessments of the class of property valued at the lowest percentage of fair cash value. It is not necessary for us now to consider whether patterns of illegal and discriminatory assessment may exist which are so complicated as to require the use of remedies which would treat the whole tax levy as invalid."

The City does not quarrel with the general principle expressed in the above quote, but it does quarrel with the language of the footnote, for it is this footnote which has engendered a series of erroneous decisions culminating in the present case. *Board of Assessors of Weymouth* v. *Curtis,* Mass. Adv. Sh. (1978) 1676; *Kavet* v. *Board of Assessors of Watertown,* Mass. Adv. Sh. (1978) 2174. The holding of this Court in the *Sioux City* case, that the taxpayer is entitled to a reduction to the amount at which others are taxed, would from the record in that case seem to be average class, i.e., 55 percent, and not lowest class. The facts in the *Sioux City* case indicate that the taxpayer developed a ratio of assessed value to total value by comparing the assessed value of all "acre" land in the taxing district to the estimated fair cash value of such land. Much the same procedure was used with respect to improved property in South Sioux City in which the fair cash value of the entire district was established through use of selected

sales data. Thus, the procedure followed in the *Sioux City* case is similar to that advocated by the City before the Board. The City claims that the ratio of assessed value to fair cash value of the entire City, i.e., the average ratio of assessments, should be applied to the fair cash value of petitioner's property in order to calculate the appropriate abatement.

The Supreme Judicial Court also overlooked the practical impact of its decision, which discriminates against taxpayers of all classes in the ensuing year, while the "aggrieved" taxpayer receives a windfall. This point was stressed by the dissent, which found that the windfall received by Tregor as a result of this decision would create a revenue shortfall which would have to be made up by a general tax increase in subsequent years. This burden would fall inequitably on all taxpayers, to the sole benefit of Tregor. The better practice would be to reduce Tregor's assessment to the municipal average — "at least the taxpayer's windfall would not be shifted to others beyond what is necessary to achieve a reasonably fair result for the taxpayer: — a tax based on its just proportion of the total obligation" (Appendix A, p. 29).

Although the Massachusetts Constitution, Part II, c. 1, § 1, art. 4 prohibits the imposition of a different tax rate upon different classes of property, assessment practices in the Commonwealth have developed a *de facto* classification system. But in the event an *overassessed* taxpayer seeks an abatement, his assessment should be reduced to the level of his "class," which in Massachusetts is comprised of all taxpayers in the municipality:

"The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed by others of the

same class. The right is the right to equal treatment." *Hillsborough Twp.* v. *Cromwell, supra* at 623.

The level at which others are taxed in the City is represented by the average ratio of assesed value to fair cash value of all property in the City. Equality is achieved by reducing the aggrieved taxpayer's assessment so that he bears only his *pro rata* share of the expenses of government. When relief exceeds his *pro rata* share, his windfall becomes the burden of other taxpayers in the City.

The overwhelming majority of decisions in other jurisdictions support this view. *See: In re Appeals of Kents,* 34 N.J. 21, 166 A. 2d 763 (1961); *Siegal* v. *Newark,* 38 N.J. 57, 183 A. 2d 21 (1962); *Bade* v. *Drachman,* 4 Ariz. App. 55, 417 P. 2d 689 (1966); *Deitch Co.* v. *Board of Property Assessment,* 417 Pa. 213, 209 A. 2d 397 (1965). In response to an argument by a taxpayer identical to the argument proffered by Tregor in the present case, the Supreme Court of New Jersey stated:

> "Hence, as to assessments made, the injured taxpayer is remitted to a different remedy, to wit, a reduction of his assessment to the 'common level' of assessments in the taxing district. The thesis is that the taxpayer is injured by so much of the tax bill as exceeds his *pro rata* share of the local government. True, there may remain some residual harm in that the dollar value of the reduction may be recaptured in another year from all properties including that of the successful appellant. But perfect relief is inherently impossible. If the taxpayer pays no more than his fair share for the year in question, practical justice is achieved. Surely, if the taxpayer who appeals is permitted to pay less than his fair share, the injustice to those who were overassessed but did not complain would be compounded. . . .

> "None of the cases cited by the taxpayers supports the proposition that an excessive assessment should be reduced to the level of the most favored class when to do so would relieve the taxpayer of a part of his *pro rata* share of the total burden." *Siegel* v. *Newark,* 38 N.J. 57, 61-62, 183 A. 2d 21, 23 (1961).

The basis for the Court's conclusion was its earlier decision in *In re Appeals of Kents, supra* at 765, which rested upon the constitutional principles enunciated by this Court in the *Sioux City* case.

The unique status of Massachusetts was specifically addressed by the Arizona Court of Appeals in *Bade* v. *Drachman, supra,* 417 P. 2d at 698-699. In support of their argument for use of the lowest substantial class as the measure of relief, the taxpayers referred to the *Shoppers' World* decision and footnote ten quoted above. Relying on the *Siegel* decision in New Jersey, the Arizona Court both distinguished the Massachusetts cases and rejected them in favor of the "better view."

> "We find the overwhelming weight of authority in this country, in those jurisdictions which allow any relief at all to the 'undervalued' taxpayer, to be that the taxpayer is not entitled to be taxed at the lowest percentage that he can point to, but rather at what would be his share of the tax burden if the taxing authorities were faithfully adhering to the clear mandates of statute." *Id.* at 698.

These decisions, which were decided on constitutional grounds established by this Court, serve to emphasize the Supreme Judicial Court's misconstruction of the requirements of the equal protection clause in the context of the local property taxation and the fundamental inequity of the remedy which it has fashioned.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM F. YORK,
WALTER H. McLAUGHLIN, SR.,
WALTER H. McLAUGHLIN, JR.,
MICHAEL EBY,
GILMAN, McLAUGHLIN & HANRAHAN,
Ten Post Office Square,
Boston, Massachusetts 02109.
(617) 482-1900
Attorneys for the Petitioner

Appendix A.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

No. 1615.

NORMAN TREGOR, trustee,
vs.
BOARD OF ASSESSORS OF THE CITY OF BOSTON
(and seven companion cases).

Suffolk. January 3, 1979 - March 23, 1979.

Present: Hennessey, C.J., Quirico, Braucher, Kaplan, Wilkins, Liacos, & Abrams, JJ.

Taxation, Real estate tax: assessment, abatement. *Boston.*

APPEALS from decisions of the Appellate Tax Board.

Walter H. McLaughlin, Jr. (*Walter H. McLaughlin, Sr.,* with him) for the Appellate Tax Board.
Arthur D. Altman for the taxpayer.

BRAUCHER, J. We are asked to reconsider the remedy available to a taxpayer who is a victim of disproportionate assessment. Under our decisions "a taxpayer has a right to have his assessment reduced so that it is 'proportional to the assessments of the class of property valued at the lowest percentage of fair cash value.'" *Assessors of Weymouth* v. *Curtis,* Mass. , (1978),* quoting *Shoppers' World, Inc.* v. *Assessors of Framingham,* 348 Mass. 366, 377-378 n.10 (1965). The Appellate Tax Board (board) applied that rule to the present cases, but expressed a preference for reduction of the assessment only to a level proportional to the average percent-

* Mass. Adv. Sh. (1978) 1676, 1687.

age of fair cash value computed for the assessments of all taxable property in the taxing district. We affirm the decisions of the board.

In the principal case the assessors of Boston valued land and an office building owned by the taxpayer at $320,000 and assessed a real estate tax for the 1977 fiscal year of $80,928. The taxpayer made timely application for abatement and appealed to the board from the assessors' denial of his application. The board granted an abatement based on $87,904 as the "ultimate value" of the taxpayer's property, and the assessors appealed.

The parties stipulated that the appropriate method of determining the fair cash value of the property was the capitalization of income method, that the net income of the property before taxes was $55,000, and that the proper capitalization rate was 10% to account for return on investment and for depreciation. They left to the board the determination of the appropriate "tax factor."

The parties further stipulated that the class of property assessed at the lowest percentage of fair cash value in Boston was single-family residential property, which was assessed at an average rate of 26.8% of fair cash value as determined from figures reported by the Commissioner of Corporations and Taxation. The average for all taxable real and personal property in the city was 50.2%. The parties stipulated that these 1976 percentages "may apply" to the 1977 fiscal year for the purposes of the proceedings before the board.

The board computed the "tax factor" by multiplying the current tax rate ($252.90 per $1,000 assessed valuation) by the assessment percentage of the most favored class (26.8%), yielding a tax factor of .0678. The stipulated net income ($55,000) was divided by the combined factor for return, depreciation and taxes (.10 + .0678 = .1678), yielding a fair cash value of $327,771, rounded to $328,000.

Application of the single-family residence percentage then produced an assessed value proportional to that of the most favored class ($328,000 X 26.8% = $87,904). The tax on that value ($87,904 X .25290 = $22,230.92), subtracted from the income ($55,000 — $22,230.92 = $32,769.08), yields approximately 10% of the fair cash value ($32,777.10) to cover return and depreciation. See *Assessors of Lynn* v. *Shop-Lease Co.*, 364 Mass. 569, 571-572 (1974).

1. *The requirement of full valuation.* Our Constitution empowers the Legislature to impose "proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth." Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution. Cf. art. 10 of the Declaration of Rights: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute *his share* to the expense of this protection" (emphasis supplied). The former provision forbids the imposition of taxes "upon one class of persons or property at a different rate from that which is applied to other classes, whether that discrimination is effected directly in the assessment or indirectly through arbitrary and unequal methods of valuation." *Cheshire* v. *County Comm'rs of Berkshire,* 118 Mass. 386, 389 (1875), quoted in *Bettigole* v. *Assessors of Springfield,* 343 Mass. 223, 230-231 (1961).

Pursuant to the Constitution, our statutes require assessors to assess property at its "fair cash valuation." G. L. c. 59, § 38. Cf. G. L. c. 41, § 29 (assessors' oath). But "illegal assessments have long been the rule rather than the exception throughout much of the Commonwealth." *Sudbury* v. *Commissioner of Corps. & Taxation,* 366 Mass. 558, 563 (1974), and cases cited.

The present cases are not affected by art. 112 of the amendments to the Constitution, ratified in November, 1978. The amendment authorizes the Legislature to classify property according to its use for the purposes of taxation, and G. L. c. 59A, inserted by St. 1978, c. 580, § 38, provides for such a classification. But the statute is to be applicable to property taxes assessed for the fiscal year beginning 1980. St. 1978, c. 580, § 40. We decide no question with respect to the amendment or the statute.

2. *Boston assessments.* The stipulation of the parties incorporates a report of the Commissioner of Corporations and Taxation for the year 1976. That report describes a pattern of assessment in the city of Boston in flagrant disregard of constitutional and statutory mandates. Assessments of various classes of real and personal property are shown at average percentages of full value ranging from 26.8% to 100%. The board listed separate percentages for single-family residential property in various wards, showing a range from 17% and below for Wards 1 and 2 to 79.2% and above for Ward 12. Compare *Sudbury* v. *Commissioner of Corps. & Taxation,* 366 Mass. 558, 567 (1974), where, on the basis of a narrower range for Boston districts, we said, "The process has lost contact with reality."

The city does not now dispute the fact that the taxpayer is aggrieved by a disproportionate assessment. It contends only that the appropriate remedy is reduction of the taxpayer's assessment to a level proportional to the average of assessments of all classes of property throughout the city.

3. *Remedies.* On application of a taxpayer the assessors are to make a "reasonable abatement" of his taxes "if they find him taxed at more than is just proportion, or upon an assessment of any of his property in excess of its fair cash value." G. L. c. 59, § 59, as amended

through St. 1977, c. 198. For many years, however, this court denied abatements in cases like the present one: "Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is, whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons." *Lowell* v. *County Comm'rs of Middlesex,* 152 Mass. 372, 375 (1890). See *Stone* v. *Springfield,* 341 Mass. 246, 250-251 (1960), and cases cited.

Bettigole v. *Assessors of Springfield,* 343 Mass. 223 (1961), established that a court of equity might "prevent the enforcement of the whole of an illegal city or town tax assessment for a given year," but such extraordinary and drastic relief is narrowly confined. *Leto* v. *Assessors of Wilmington,* 348 Mass. 144, 148-149 (1964). Other remedies provided some measure of relief from disproportionate assessments, but were "not wholly satisfactory." *Id.* at 147. To afford taxpayers their constitutional rights, we reconsidered and abandoned the rule of the *Lowell* case in *Shoppers' World, Inc.* v. *Assessors of Framingham,* 348 Mass. 366, 373-376 (1965). Since that decision we have continued to confine alternative remedies within narrow limits. *Nearis* v. *Gloucester,* 357 Mass. 203, cert. denied, 400 U.S. 918 (1970) (injunction). *Sears, Roebuck & Co.* v. *Somerville,* 363 Mass. 756 (1973) (action of contract under G. L. c. 60, § 98). But within those limits we have ordered comprehensive declaratory and injunctive relief, directing the filing of plans for orderly re-

valuation. *Coan* v. *Assessors of Beverly,* 349 Mass. 575 (1965) (taxpayer suit under G. L. c. 40, § 53). *Bennett* v. *Assessors of Whitman,* 354 Mass. 239 (1968) (same).

In *Sudbury* v. *Commissioner of Corps. & Taxation,* 366 Mass. 558, 565-568 (1974), we dealt with the problem of discrimination against those cities and towns whose assessors act lawfully, in favor of those whose assessors engage in the illegal practice of fractional valuation. The State Tax Commission was required to establish an "equalized valuation" for each city and town. G. L. c. 58, §§ 9-10C. Those valuations play an important part in the distribution of State funds and in the apportionment of county and other taxes. It appeared that fractional valuation made the equalization task difficult, if not impossible. We noted that such complex problems are usually solved by executive action or pursuant to express legislative directions, and ordered the entry of a decree declaring the powers and duties of the Commissioner of Corporations and Taxation and the State Tax Commission.

Malden v. *Appellate Tax Bd.,* 367 Mass. 395, 403 (1975), began as an attack on the equalized valuation established for Boston in 1974. That attack, however, was withdrawn. We upheld the constitutionality of the equalization statutes against the claim that they resulted in discrimination against cities and towns other than Boston. We did not pass on the question whether any other remedy was available to those cities and towns.

Pursuant to the decree in the *Sudbury* case, the Commissioner of Corporations and Taxation and the State Tax Commission have reported the progress of a continuing program to produce uniformity throughout the Commonwealth in valuation and assessments. The assessors of Boston assert that that program is in the process of implementation in Boston under the supervision of the Superior Court. In argument they estimated that comprehensive revaluation will take two to three years and cost about $7 million.

4. *Abatement to the municipal average.* Comprehensive remedies seek to produce uniform assessments at fair cash value. "Where every assessment has been made on a wrong basis, the defects in the scheme cannot be cured by the sporadic correction of individual assessments." *Bettigole* v. *Assessors of Springfield,* 343 Mass. 223, 236 (1961). But no comprehensive remedy can be ordered by the Appellate Tax Board in an abatement proceeding. The *Shoppers' World* case involved "a simple form of discrimination" — substantially all property was assessed at 45% of fair cash value, but one taxpayer's property was assessed at a higher percentage. In that situation the remedy was an abatement "which will make the taxpayer's assessment proportional to other assessments, on a basis which reaches results as close as is practicable to those which would have followed application by the assessors of the proper statutory assessment principles." 348 Mass. at 377-378.

That conclusion rested in part "on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." 348 Mass. at 373, quoting *Sioux City Bridge Co.* v. *Dakota County, Neb.,* 260 U.S. 441, 446 (1923). In dictum we added that if, as in the *Bettigole* case, several different percentages had been employed for different classes of property, the same principle "would logically require reduction of the assessment of the taxpayer against whom there had been discrimination so that such taxpayer's assessment would be proportional to the assessments of the class of property valued at the lowest percentage of fair cash value." 348 Mass. at 377-378 n.10.

Most of our cases applying the rule of the *Shoppers' World* case have focused on the issue whether there was a sufficient showing of disproportionate assessment. *Beardsley* v. *Assessors of Foxborough,* 369 Mass. 855, 859 (1976). *Coomey* v. *Assessors of Sandwich,* 367 Mass. 836, 838-839 (1975). *Assessors of Kingston,* v. *Sgarzi,* 367 Mass. 840, 843 (1975). *First Nat'l Stores, Inc.* v. *Assessors of Somerville,* 358 Mass. 554, 560-562 (1971). *Butler* v. *Assessors of Worcester,* 354 Mass. 651, 654 (1968). In the *First Nat'l Stores* case, however, we relied on evidence of average percentages for all classes of property to show disproportion. See 358 Mass. at 556 & n.3. We think the aggrieved taxpayer may, if he chooses, claim an abatement of his assessment to the average percentage of fair cash value computed for the assessments of all taxable property in the taxing district. That remedy may be particularly appropriate when there is no apparent pattern in the disproportionate assessments. *Lerner Shops of Conn., Inc.* v. *Waterbury,* 151 Conn. 79, 87-89 (1963). *Southern Bell Tel. & Tel. Co.* v. *County of Dade,* 275 So. 2d 4, 10 (Fla. 1973). *Grainger Bros.* v. *Board of Equalization,* 180 Neb. 571, 585-586 (1966). *In re Appeals of Kents 2124 Atlantic Ave., Inc.,* 34 N.J. 21, 30-32 (1961). *Deitch Co.* v. *Board of Property Assessment,* 417 Pa. 213, 220-221 (1965).

We think a taxpayer makes out at least a prima facie case of disproportionate assessment if he shows that his property is assessed at a percentage of fair cash value greater than the average percentage for all taxable property in the city or town, using the fair cash value of all such property as determined by the Commissioner of Revenue (formerly the State Tax Commission) pursuant to G. L. c. 58, § 10C. See *In re Appeals of Kents 2124 Atlantic Ave., Inc.* 34 N.J. 21, 26-28 (1961); *Ed Guth Realty, Inc. v. Gingold,* 34 N.Y. 2d 440, 449-451 (1974); *Pittsburgh Miracle Mile Town & County Shopping Center, Inc.* v. *Board of Property Assessment,* 417 Pa. 243, 247-248 n.3 (1965); *Barnet v. Palazzi Corp.,* 135 Vt. 293, 300 (1977); Note, Inequality in Property Tax Assessments: New Cures for an Old Ill, 75 Harv. L. Rev. 1374, 1392-1395 (1962). Otherwise, proof of disproportionate assessment, in the absence of a stipulation like that in the present case, imposes on the taxpayer a wasteful burden of proving the assessed values and the fair cash values of a great number of properties other than his own. See *First Nat'l Stores, Inc.* v. *Assessors of Somerville,* 358 Mass. 554, 555-556, 560 (1971); *Butler* v. *Assessors of Worcester,* 354 Mass. 651, 654 (1968); *Shoppers' World, Inc.* v. *Assessors of Framingham,* 348 Mass. 366, 377 (1965). To require the taxpayer to revalue even a substantial fraction of the property of a large city may be tantamount to a denial of relief.

5. *Abatement to the average for the most favored class.* The question remains whether we should stand by the dictum in the *Shoppers' World* case, which became the holding in *Assessors of Weymouth* v. *Curtis,* Mass. , (1978).[b] In the *Curtis* case we upheld an abatement of the tax on commercial property to an amount based on 70% of its fair cash value, in the face of an argument much like that in the present case. We held that it was not improper to include only sales of residential properties in the study on which the 70% figure was based. A similar result was ordered as to industrial property in *Kavet* v. *Assessors of Watertown,* Mass. (1978).[c] Cf. *Chomerics, Inc.* v. *Assessors of Woburn,* Mass. App. Ct. , (1978)[d] (assessments of commercial and industrial property reduced to residential average).

[b] Mass. Adv. Sh. (1978) 1676, 1687.

[c] Mass. Adv. Sh. (1978) 2174.

[d] Mass. App. Ct. Adv. Sh. (1978) 610, 613-615.

The same problem has arisen in other jurisdictions, and in several States taxpayers have been limited to reduction to the municipal average for all taxable property. *Bade* v. *Drachman*, 4 Ariz. App. 55, 64-65 (1966). *Siegel* v. *Newark*, 38 N.J. 57, 62-64 (1962). See *Chomerics, Inc.* v. *Assessors of Woburn*, Mass. App. Ct. , n.10 (1978).* Cf. *Kays, Inc.* v. *Board of Tax Review*, 170 Conn. 477 (1976) (failure of proof of municipal average); *Addington* v. *County Comm'rs*, 191 Kan. 528, 529-530 (1963) (claim based on county median); *Hoerner-Waldorf Corp.* v. *Ontonagon*, 26 Mich. App. 542, 547-548 (1970) (calculation of township average); *Rick Appeal*, 402 Pa. 209, 210-211 (1961) (favored class not substantial). The theory seems to be that the municipal average produces a tax approximating the tax that should have been imposed by lawful assessment practices.

Use of the municipal average reduces the discrimination between those who do and those who do not seek abatements. But such discrimination is inherent in the abatement procedure, and the use of the municipal average affords only partial equalization between the favored taxpayer and the disfavored taxpayer. Suppose, for example, four taxpayers with properties of equal value. Two are residential and are unlawfully assessed at 25% of that value; two are commercial and are unlawfully assessed at 75%. A comprehensive remedy would reassess all at 100%; reassessment of all at the 50% average would produce the same tax, in the absence of some exemption. If one of the commercial taxpayers is granted an abatement to 50%, he is treated better than the other, but he is still a victim of the discrimination in favor of residential property. Cf. *Dehydrating Process Co. of Gloucester, Inc.* v. *Gloucester*, 334 Mass. 287, 293 (1956)

* Mass. App. Ct. Adv. Sh. (1978) 610, 620 n.10.

(assessment of only two of a much larger number of occupants of a pier, illegal and void). In such circumstances several courts have insisted on complete relief by reduction to the average percentage for the most favored substantial class. *Kittery Elec. Light Co.* v. *Assessors of Kittery*, 219 A.2d 728, 739 (Me. 1966) (utility assessment reduced to residential percentage). *Hamm* v. *State*, 255 Minn. 64, 67-68 (1959) (taxpayer aggrieved by assessment at municipal average). *Chicago, Rock Island & Pac. Ry.* v. *Young*, 60 S.D. 291, 293-297 (1932), and cases cited: "There being now no way to bring the favored persons up to the level where all should have been, the only way to remove the discrimination is to bring appellant down to their rate, even though it is a rate lower than any one was ever lawfully entitled to receive." See *Baken Park, Inc.* v. *County of Pennington*, 79 S.D. 156, 160 (1961).

We do not agree with the assessors' contention that the lowest-class remedy is punitive rather than remedial. In *Assessors of Lynn* v. *Shop-Lease Co.*, 364 Mass. 569 (1974), we upheld the appeal of assessors who had stipulated that they assessed property at 30% of fair cash value. A dissenting Justice would have dismissed their appeal "out of hand," refusing to adjudicate proportionality in the context of "a throughly illegal system." *Id.* at 574-577. But a majority of the court refused to compel the taxpayers of the city "to suffer in effect a forfeiture to Shop-Lease of tax revenues to which the city is entitled," although assessors who flagrantly fail to perform their duty were warned that they "may expect to receive an unsympathetic reception in this court." *Id.* at 572. We adhere to that decision. But the board's decision in the present case does not impose a forfeiture; it vindicates the rights of the aggrieved taxpayer by conforming his assessment to those of more favored taxpay-

ers. The remedy may provide some incentive to the assessors to comply with laws they have blatantly violated for years, but that fact does not render it punitive.

This case was presented to the board and is presented to us as a choice between the municipal average of 50.2% and the lowest-class average of 26.8%. In these circumstances we uphold the board in following our past decisions, under which the taxpayer is entitled to an abatement to the lowest percentage. We have not gone behind the stipulation of the parties to review possible weaknesses in the agreed percentages, nor have we reexamined the stipulated conclusion that single-family residential property, assessed at an average rate of 26.8%, is "the lowest substantial class." It appears that such property constituted more than $600 million out of a total of $3,600 million of full valuation. We do not now decide how large the favored category must be to bring into play the rule we now apply. Cf. *Chomerics, Inc.* v. *Assessors of Woburn*, Mass. App. Ct. (1978)[f] (undisclosed amount of vacant residential property assessed at very low rate).

We are not persuaded by what the taxpayer calls "the city's doomsday argument." The assessors argue that the decision we now reach will result in huge total abatements, a massive rise in the "effective tax rate" and an unbearable increase in the average residential tax bill, leading to a sudden reduction in property values, an increase in mortgage foreclosures and other adverse effects. In other contexts the city has made more optimistic forecasts,[1] and it seems clear to us that the adverse conse-

[f] Mass. App. Ct. Adv. Sh. (1978) 610.

[1] We allow the taxpayer's motion to enlarge the record to include a document entitled "Official Statement of the City of Boston, Massachusetts," dated August 23, 1978, relating to the issue of temporary loan notes. Cf. Mass. R. A. P. 8 (e), 365 Mass. 849 (1974). A similar document dated November 1, 1977, was

quences will be far less than the assessors claim. In any event the consequences will be less burdensome than the consequences of full compliance with the law. We, like the assessors, are required to comply with the law, burdensome or not.

Decisions of the Appellate Tax Board affirmed.

WILKINS, J. (dissenting, with whom Hennessey, C.J., joins). In my view, the court has not previously faced the issue presented in this case. The traditional disproportionate assessment case, unlike this one, has involved a municipality in which the bulk of the real estate was in the single family or residential category and one or more classes of industrial, commercial, or business property were assessed at a higher proportion of fair cash value than the municipality's residential real estate. In cases of that character, the municipal average and the average of the most favored class are roughly equivalent. The remedy of abating assessments on nonresidential property to the proportion applicable to residential property thus seemed equitable and appropriate. Such was apparently the situation in *Assessors of Weymouth* v. *Curtis*, Mass. (1978),[a] a decision in which I did not participate, where for the first time we held, but without analysis, that an abatement to the average of the most favored class of property was required.[1]

placed in evidence. In our view nothing turns on the added document. Cf. *Sussman* v. *Commonwealth*, Mass. , n.2 (1978) (Mass. Adv. Sh. [1978] 754, 755 n.2).

[a] Mass. Adv. Sh. (1978) 1676.

[1] The dictum to the same effect in *Shoppers' World, Inc.* v. *Assessors of Framingham*, 348 Mass. 366, 377-378 n.10 (1965), relied on a principle asserted to be found in *Sioux City Bridge Co.* v. *Dakota County, Neb.*, 260 U.S. 441, 446 (1923), although that case in fact did not involve different classes of property of which one was the most favored.

Abatement to the average of the most favored class in this case results in the successful taxpayer's paying less than it would have paid if the city had assessed all property at 100% of cash value or at the same proportion of fair cash value. As a consequence of the court's decision, the taxpayer receives a windfall from the city's violation of the law. I doubt that an abatement to a proportion below the municipal average is required either statutorily or constitutionally, and I do not read the court's opinion as resting on constitutional grounds or on any explicit statutory mandate. However, there is some logic for the court's determination to abate the taxpayer's assessment to the average of the most favored class. In that way, the taxpayer will be treated equitably in relation to the class which (on this record) obtains the most favorable treatment. The question remains, however, whether the choice selected by the court is truly the better one in this instance and in all other instances, as the opinion seems to indicate.

A decision to grant any abatement, of course, tends to have a negative impact on the revenues of the city. Any shortfall of revenue will have to be made up by an appropriate increase in the tax revenues collected in some subsequent fiscal (tax) year. The increase in taxes to make up for revenue deficiencies resulting from abatements to the average of the most favored class will fall inequitably on those taxpayers whose assessments are above that average. Those disfavored taxpayers will be persons who do not protect their rights by seeking and obtaining abatements. In general, they will be people who do not have the resources or understanding necessary to carry through the process of seeking an abatement.

The procedural requirements of an abatement proceeding are not simple. If every aggrieved taxpayer were to

pursue such a remedy, the process would become cumbersome and, from a practical point of view, inadequate. The cost of a hearing before the Appellate Tax Board, involving legal expenses and often expert testimony, is not inconsiderable. A landlord who passes any increase in local real estate taxes through to tenants will have little or no incentive to seek an abatement, and, as a practical matter, individual tenants may not be able to pursue abatement procedures.

It is thus apparent that the windfall to a taxpayer who knows how to and does protect his rights places an extra burden on those who are similarly discriminated against but do not protect their rights. While one might conclude that, in the best of all worlds, a taxpayer who does not protect his rights has made an informed choice not to do so, as a practical matter, in the *Alice in Wonderland* world into which Boston assessment practices have fallen, such informed choices are not made. In its decision to assure equality of treatment between the taxpayer in this case and owners of property in the most favored class, the court has indirectly chosen to heap an additional, and I think, an unfair burden on other taxpayers who already have been treated inequitably.

I prefer a result that gives the taxpayer an abatement to the level at which it would have been assessed if the law had been complied with. Even such a result would not avoid unfairly shifting some burden onto property assessed at more than the municipal average of 50.2% (e.g., as the record shows, triple dwelling units, which have an average assessment ratio of 62.2%), but at least the taxpayer's windfall would not be shifted to others beyond what is necessary to achieve a reasonably fair result for the taxpayer:— a tax based on its just proportion of the total obligation.

I would reverse the decision of the Appellate Tax Board and order that (with an appropriate adjustment in the tax factor) the abatement be granted to the level of the municipal average.[2] Attempts at relief from the general inequity of Boston real estate assessment practices should be made in proceedings brought in direct challenge to the system (see, e.g., *Bennett* v. *Assessors of Whitman,* 354 Mass. 239 [1968]; *Coan* v. *Assessors of Beverly,* 349 Mass. 575 [1965]; *Bettigole* v. *Assessors of Springfield,* 343 Mass. 223 [1961]), and not in individual abatement proceedings where the pattern of relief is haphazard, partial, and, at least in this case, inequitable to others.

[2] I agree with the opinion of the court that "a taxpayer makes out at least a prima facie case of disproportionate assessment if he shows that his property is assessed at a percentage of fair cash value greater than the average percentage for all taxable property in the city or town," using the Commissioner of Revenue's determination under G. L. c. 58, § 10C. *Ante* at . Mass. Adv. Sh. (1979) 779.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

NORMAN TREGOR, TRUSTEE
V.
BOARD OF ASSESSORS OF THE
CITY OF BOSTON

Docket No. 89209 Promulgated: September 14, 1978

This is an appeal under the formal procedure from the refusal of the Board of Assessors to abate taxes for the fiscal year 1977, assessed on real estate located at 33 Broad Street, Ward 3, in the City of Boston.

These findings of fact and report are made pursuant to the request of the appellee under G. L. c. 58A, §13 as amended.

Arthur D. Altman, Esq., for the appellant.
Walter H. McLaughlin, Sr., Esq., for the appellee.

FINDINGS OF FACT AND REPORT

The owner of the subject property is Norman M. Tregor, Trustee of the Broad Street Trust. He was assessed under the name Norman Tregor, Trustee. The subject property consists of 3,680 square feet improved with an 11-story, mezzanine, and basement, stone and brick office building.

For the 1977 fiscal year, the appellee valued the subject property at $320,000 and assessed a tax thereon at the rate of $252.90 per thousand in the amount of $80,928.00. On October 29, 1976, within thirty days of the mailing of the tax bills, the appellant filed an application for abatement. The appellee failed to act on the application prior

to the expiration of three months from the date of filing, whereupon it was deemed denied by operation of law on January 29, 1977, and on March 18, 1977, the appellant filed a timely appeal with this Board from such denial. The first installment of taxes was paid without incurring interest on October 27, 1976.

The subject land has frontage of 80′ 10″ on Broad Street and 50′ on Water Street, also 52′ 2″ feet on discontinued Central Street. The area in which the subject property is located is a General Business District designated as a B-10 District under the latest Boston Zoning Ordinance and the Zoning Map of the City of Boston. The buiding was originally constructed as a four-story building in 1880. The upper floors were completed in 1904. The building has been remodeled and as remodeled, the building has an effective age of 73 years.

The parties have stipulated that in finding the fair cash value of the property, the Board shall "use the capitalization of income and use the following procedure:

(a) The Board shall capitalize the net income before real estate taxes arising from the subject property which net income for the purposes of this Stipulation, only, the parties agree to be $55,000.

(b) The Board shall use a capitalization rate of (for return and depreciation) and shall further apply such tax factor (including such disproportion ratio as the Board shall determine), as the Board shall deem appropriate."

The Board accepted the Stipulation and followed said "procedure" in its determination of the fair cash value of the property, as hereinafter set forth.

As to the tax factor to be used in our capitalization rate (including a disproportion ratio), the Board relied upon Paragraph 7 of another Stipulation entered into by and between the parties in several appeals against the Board of Assessors of the City of Boston, including the

instant appeal, which said appeals were consolidated and heard together. By said Paragraph 7, the parties agreed that:

> "Only if the appropriate theory of law is that the petitioners' assessments should be reduced to reflect the assessment/value ratio of the lowest substantial class, this percentage, namely, 26.8 percent, should be applied to the Appellate Tax Board's determination of fair cash value for the years in issue in order to determine the assessed valuation of the petitioners' property for the years in issue."

The Board finds that the "lowest substantial class" and the assessment/sales price ratio applied to that class, as determined by the Commissioner of Corporations & Taxation, in the year 1976, for the City of Boston, and as adopted by the parties in their Stipulation and by this Board in its Findings, is as follows:

Single family residence property * (R-1) Ratio 0.268

On the basis of the above Stipulation and Findings, the Board arrived at its determination of value of the subject property as follows:

NET INCOME BEFORE REAL ESTATE TAXES, DEPRECIATION AND RETURN ON INVESTMENT	$55,000

* Under the Commissioner's system of classification, which local assessors are required to follow, there are four residential classes designated R-1 (single-family), R-2 (two-family), R-3 (three-family), and R-4 (four or more dwelling units). A fifth class, R-C, denotes properties combining commercial enterprises and dwelling units.

Capitalization Rate:

Return on Investment & depreciation on Bldg. Only:		10.00%
Tax Factor:		
Tax Rate	252.90	
Disproportionate assessment	26.80	
		6.78%
Total Factor		16.78%

$55,000, capitalized at 16.78%, results in a finding of fair cash value of $327,771, rounded to $328,000. The disproportionate assessment of 26.8% applied to our finding of fair cash value in the amount of $328,000 produced the Board's ultimate value of $87,904.

Abatement granted, as follows:

Year	Location	Assessed Valuation	Tax Assessed
1977	33 Broad St.	$320,000	$80,928

Fair Cash Value	26.8% of Fair Cash Value	Abatement
$328,000	$87,904	$58,897.08

OPINION

The parties have stipulated (Attachment 1, Par. 7) that "Only if the appropriate theory of law is that the Petitioner's assessments should be reduced to reflect the assessment/value ratio of the lowest substantial class, this percentage, namely, 26.8 percent, should be applied to the Appellate Tax Board's determination of fair cash value for the years in issue in order to determine the assessed valuation of the Petitioner's property for the years in issue."

The Board has accepted that Stipulation. We are of opinion that the "appropriate theory of law" is that Petitioner's assessment should be reduced to reflect the assessment/value ratio of the lowest substantial class. That class and the ratio pertaining to that class has been determined by the Board, on the basis of said Stipulation and as ascertained by the Commissioner of Corporations and Taxation (Attachment 1, Par. 5; Attachment 2), to be a Single-family Residence property (R.-1), Assessment Ratio 0.268%.

We used that ratio twice in determining our ultimate value of the subject property at $87,904; first, in computing the tax factor incorporated in our capitalization rate of 16.78, we applied said ratio to the tax rate of $252.90, thus arriving at our tax factor of 6.78%; and secondly, we applied said ratio to our finding of fair cash value of $328,000 to obtain our said ultimate value.

For our authority that "the appropriate theory of law" is to apply the assessment/value ratio of the lowest substantial class, see *Assessors of Weymouth v. Curtis,* 1978 A. S. 1676, citing *Shoppers' World, Inc. v. Assessors of Framingham,* 348 Mass. 366, 377-378, n. 10[1] (1965); *Herbert I. Kavet, Trustee v. Board of Assessors of Watertown,* Mass. (1978); see also *Chomerics, Inc. & others v. Board of Assessors of Woburn & another,* 1978 MASS. Appeals Court A. S. 610.

[1] Footnote 10 of the *Shoppers' World, Inc.* case in pertinent part states: "If, as in the *Bettigole* case, 343 Mass. 223, 227, it should be shown that several different percentages of full, fair cash value were employed in valuing different classes of property, the principle discussed in the *Sioux City Bridge Co.* case would logically require reduction of the assessment of a taxpayer against whom there had been discrimination so that such taxpayer's assessment would be proportional to the assessments of the class of property valued at the lowest percentage of fair cash value."

As to the appropriateness of applying the assessment/value ratio so as to reduce the tax factor incorporated in our capitalization rate, see *Board of Assessors of Lynn v. Shop-Lease Co. Inc.,* 364 Mass. 569. At Page 573 of that decision, the Court said: "Where the fair cash value determined by capitalization of earnings is to be reduced in arriving at the assessed valuation, the tax factor must be proportionately reduced."

In reducing the appellant's assessment to reflect the assessment/value ratio of the lowest substantial class, we have followed *Shoppers' World, Inc.,* n. 10, *Curtis,* and *Kavet,* supra, as stated above, but we have grave reservations, however, based on constitutional considerations both State and Federal, as to whether the rule of those cases is applicable on the record of this appeal. For purposes of discussing our doubts, we have included as Attachments at the end of these findings of fact and report, the following documents:

A. The full text of the said Stipulation entered into by and between the parties in the several appeals against the Board of Assessors of the City of Boston, referred to in our findings of fact above; *Attachment No. 1.*

B. The "Computation of Total Assessed Value of the City of Boston at Stipulated Lowest Class"; *Attachment No. 2.*

C. "Summary of Important Facts", consisting of two pages; *Attachment No. 3.*

D. Annex 'A' appearing at Page 227 of *Bettigole v. Assessors of Springfield,* 343 Mass. 223, 227; *Attachment No. 4.*

We begin our discussion with two provisions of the Constitution of Massachusetts which are here relevant and controlling. The first is contained in art. 10 of the Declaration of Rights, the first portion of which reads: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obligated, consequently, to contribute his share to the expense of this protection . . ." In the circumstances of the instant appeal, the emphasis is upon the words "his share". These words forbid the imposition upon one taxpayer of a burden relatively greater or relatively less than that imposed upon other taxpayers. If this is not the meaning of these words, they mean nothing at all. Words of the Constitution cannot be ignored as meaningless. This provision of the Declaration of Rights is the statement of a general principle. It is controlling of all constitutional provisions touching taxation. See *Opinion of the Justices,* 332 Mass. 769, 777-778.

The second provision of the Constitution of Massachusetts to which we have referred above is found in Part II, c. 1, §1 art. 4. That provision of the Constitution as well as G.L. c. 59, §§38, 52, require that real estate be assessed at its full fair cash value. See *Curtis, supra,* P. 1683, *Coomey v. Assessors of Sandwich,* 367 Mass. 836, 837 (1975). Said provision applies to property taxes and requires that assessments, rates and taxes be "proportional and reasonable".

Where full value assessment is not the practice, it is recognized that "the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of the statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Shoppers' World, Inc.,* supra,

quoting from *Sioux City Bridge Co. v. Dakota County, Nebraska,* 260 U.S. 441, 446 (1923).

If, as in the instant appeal, it is demonstrated that the taxpayer is the victim of discriminatory, disproportionate assessment, he "may be granted an abatement . . . which will make . . . (his) assessment proportional to other assessments, on a basis which reaches results as close as is practicable to those which would have followed application by the assessors of the proper statutory assessment principles." *Shoppers' World, Inc.,* supra, *First Natl. Stores, Inc. v. Assessors of Somerville,* 358 Mass. 554, 559 (1971).

In the light of the above constitutional and statutory principles underlying the taxation of real estate, particularly the requirement of said art. 10 that each individual taxpayer contribute not more than "his share" of the burden of such taxation, we are concerned that on the record of this appeal the reduction of the appellant's assessment to reflect the lowest substantial assessment/value ratio may result in an undervaluation of the subject property, in a constitutional sense, thereby causing the appellant to pay less than "his share" of the amount of revenue to be raised and other taxpayers to pay correspondingly more.

As summarized in Attachment 3, the record of this appeal shows that while the largest number of parcels in the City of Boston is in the residential class, the bulk of the assessable value is in the commercial/industrial classification, as follows:

Class	Parcels	Assessed Value
Residential *	75,613	$611,272,000
Ind./Com.	9,638	$894,716,200

* The data above refers [sic] to all four classes of residential property.

We note that while the number of industrial/commercial parcels is approximately one-eighth of the number of residential parcels, the value of the industrial/commercial parcels is approximately one-third greater than the total of all residential assessments. Also, we note that the total assessed value of the single-family residential (R-1) class in the amount of $176,584,300 is less than 11.4% of the total value of all the classifications of property, in the amount of $1,549,461,400. Even on an equalized basis, R-1 constitutes only 18.3% of the total value. All other classes are assessed at higher ratios.

In the circumstances of this appeal, the application of the lowest substantial assessment/value ratio (R-1 ratio 0.268) seems to result in reducing the appellants's assessment of his commercial property to a level far below the level of the class of industrial/commercial property comprising the bulk of the total value of the City. Thus, the subject property appears to be undervalued in a constitutional sense, causing the appellant to pay less than "his share" under said art. 10, and other taxpayers to pay correspondingly more.

If the taxpayer who appeals is permitted to pay less than "his share" under said art. 10, then the injustice to those who were likewise overassessed but did not complain would be compounded, and, in that event, other taxpayers of Boston may be compelled to suffer in effect a forfeiture to this appellant of tax revenues to which the City is entitled. These results were discussed to some extent in *Shop-Lease Co., Inc.,* supra, albeit in the context of the use of a ratio in the tax factor where fair cash value is to be determined by capitalization of earnings. And in *Coomy,* supra, at Page 837, the Court said, "To the extent that assessors, in violation of that obligation (to assess real property at full and fair cash value),

value property at less than full and fair cash value, they must assure that each taxpayer bears only his proportional share of the tax burden."

In other cases in which the SJC has ruled or followed the rule that the assessment of the taxpayer's property should reflect the assessment/value ratio of the lowest substantial class, such ruling did not or was not likely to result in having the taxpayer pay less than "his share" under said art. 10. Thus, in *Shoppers' World, Inc.*, supra, the case in which such rule was first set forth in n. 10, the court was dealing with a relatively simple form of disproportionate assessment, namely, at a "common level" of 45% and the subject property there could have been found to have been assessed at a higher percentage of fair cash value. In *Curtis,* supra, this Board found that real estate in Weymouth was assessed at 70% of its fair cash value, although it was contended by the assessors that property in that town was assessed at 100% of its value; and in *Kavet,* supra, there was evidence in the form of a sales study showing a relationship of assessments to fair cash value of residential property averaging about 17.98%, but the assessors "made little if any headway" against this evidence.[2] In *Bettigole,* supra, referred to in said n. 10 of the *Shoppers' World* case, the classification system there involved (See Attachment D) showed residential properties consisting of 1, 2, 3, and 4 or more family dwellings assessed at percentages varying from 50% to 70% of fair cash value and public utility, commercial/industrial property at 85%; the largest number of parcels and the bulk of the value in the City of Springfield, however, was in residential property, not in the commercial/industrial class of property, as follows:

[2] Even in *Chomerics, Inc.*, supra, wherein the ratio pertaining to the lowest "representative" class (Residential 25% in 1972, and 23% in 1973) was applied to the taxpayer's commercial property, which had been assessed at a higher percentage of fair cash value, the Appeals Court, in affirming judgment, buttressed its decision by noting and commenting upon the fact that the median ratios for all property sold in those years was 25% and 23% respectively.

Class	Parcels	Sound Value	Assessed Value
Residential	31,501	385,755,819	209,016,059
Com./Ind.	2,521	174,870,514	148,641,060

It seems to the Board that in the circumstances of *Bettigole,* supra, the application of the doctrine of "lowest class" percentages to industrial/commercial properties tends to lower their assessments to those percentages of sales to assessment ratios applied to the largest number of parcels and the class of property comprising the bulk of the value in that City, namely, residential; thus satisfying the "his share" requirement of said art. 10, by rough approximation, at least.

In the instant appeal, however, the reduction of the appellant's assessment to the level of the most favored class might well result in relieving him of a part of his pro rata or proportional share of the total tax burden, contrary to the constitutional provisions discussed above in this opinion.

We have examined various cases arising in other jurisdictions which deal with the problems inherent in the practice of assessing different parcels in a community at different percentages of market value, but have found little, if any, support for the Massachusetts view that the taxpayer is entitled to have applied to his property the ratio pertaining to the "lowest substantial class".

In *Bade v. Drachman,* 4 Ariz. App. 55 (1966) at Pages 64-65, the Court said:

"We find the overwhelming weight of authority in this country, in those jurisdictions which allow any relief at all to the 'undervalued' taxpayer, to be that the taxpayer is not entitled to be taxed at the lowest percentage that he can point to, but rather at what would be his share of the tax burden if the taxing authorities were faithfully adhering to the clear mandates of statute. Among the decisions taking substantially this position are: . . . (citing cases)

In support of their contention that they are entitled to be taxed at the lowest rate used by the assessor, the plaintiffs cite only the case of Shoppers' World, Inc. v. Board of Assessors, 348 Mass. 366, 203 N.E. 2d 811 (1965). In Note 10 to this decision, appearing at 203 N.E. 2d page 820, we find dictum that would support this proposition. We do not find Shopper's World to be in point for, as we read the case, it is dealing with a situation where all properties in the taxing district were intentionally assessed at 45 per cent of fair cash value. This was the lowest and only percentage being used by the assessing authorities and accordingly, if equitable relief were to be granted, there would be no substantial inequity in using this figure. The Bettigole case, 343 Mass. 223, 178 N.E. 2d 10 (1961), cited in support of the statement made in Shoppers' World, is similarly not in point. The Bettigole action involved the sweeping relief of mandating taxing authorities to revise the entire taxing structure in the taxing district as to all properties therein so as to comport with the law. The relief granted in Bettigole would not knowingly grant to any taxpayer the right to be assessed at an amount less than a fairly apportioned share.

The Harvard Law Review note, 75 Harvard Law Review 1374 et seq., suggests that the decision of Hamm

v. State, 255 Minn. 64, 95 N.W. 2d 649 (1959) allows the taxpayer to secure a reduction 'from the average ratio to some lower level * * * presumably that of the under-assessed parcels to which he pointed in bringing his action.' (75 Harvard Law Review, page 1385) We do not construe Hamm. v. State to this effect. Though the reasoning of the case is abstruse, we believe the court held that the mere fact that the plaintiff's property was assessed at the 'average percentage' used by the assessing authorities would not necessarily establish that the taxes imposed upon the plaintiff complied with the requirement of uniformity. We believe the court was indicating that a weighted average rather than an arithmetic average of percentages would be the proper method of arriving at the plaintiff's fair share of the tax burden.

If these two lone decisions (Shoppers' World and Hamm) are authority for the proposition that a taxpayer is entitled to be assessed at the lowest percentage used, then we reject this view and adhere to what we consider to be the better view. We do not believe that in an action addressed to the equitable powers of the court, the plaintiff is entitled to injunctive relief requiring the taxing authorities to impose upon property less than what would be its share of the taxes if the law were faithfully observed."

In *Siegal v. Newark,* 38 N.J. 57 (1962), the taxing authorities stated that "residential" property was assessed in the years in question at a "common level" of 40% of true value while "commercial and industrial" properties were assessed at a "common level" of 70%. Appellants' property was in the latter category. The taxing authorities contended that the appellants' assessment should not be reduced below the level of assessment

of other properties in the same class (Commercial/Industrial, 70%), whereas the taxpayers urge reduction to the level of the most favored class (Residential, 40%). The Court did not agree with either view. Said the Court (Page 60), "We think it plain that to limit relief to the level of assessment of properties in the same category would be to join in the very illegality which the Constitution prohibits. Taxable real property must be assessed on the same standard of value and at the same local rate. Art. VIII, § I, par. 1 of the Constitution of 1947. The Constitution thus bars classification of such property for preferential treatment . . . The taxpayers' position errs on the other side, for under the facts a reduction to 40% would accord them a preference, no less violative of the constitutional rule." And at Page 62 the Court said, "None of the cases cited by the taxpayers supports the proposition that an excessive assessment should be reduced to the level of the most favored class when to do so would relieve the taxpayer of a part of his pro rata share of the total burden." Some of the facts in *Siegal*, supra, are closely similar to the facts in the instant appeal. The facts in *Siegal* are set forth at Pages 63-64, together with the Court's discussion thereof, as follows:

> "Plaintiffs urge that the level of assessment of 'residential' property be accepted as the common level because most of the line items on the assessment rolls are in that category. In that category there were 35,368 parcels, constituting 68% of the total, whereas in the 'commercial and industrial', the number was 13,442, being but 26% (the remaining 6% was 'vacant land' as to which no level of assessment appears in the proof). But the city replies that 'commercial and industrial' assessments aggregated $398,920,600,

> whereas the more numerous 'residential' assessments totaled $169,066.500. *Thus it is clear that in terms of the distribution of the burden of government, the residential level of 40% is hardly an appropriate index.** Moreover, while the city concedes that 40% is the 'common level' as to 'residential' properties, it does not say that 40% is indeed the level at which 'residential' properties were uniformly or generally assessed. There is no claim that the assessor in fact sought to assess all residences at that percentage. All that appears is that the city believed 40% to be the 'common level' and that the figure was used with respect to 'added assessments.' Hence 40% may be but an 'average ratio'; the underlying data are not supplied. We would be unworldly if we did not note the fair likelihood that within the residential category the individual assessments spanned the usual wide range, with 40% being merely a composite result. Thus if a reduction were here made to 40%, the revised assessment would likely comport with the assessments of only some of the residential properties in the city.
>
> In fact, appellants do not accept the figures of 40% and 70% as accurate statements of the 'common level' of either of the categories. In their briefs they tell us that the sales-ratio studies of the State Director of Taxation reveal average ratios for 'residential' of 38.40% and 36.81% for 1958 and 1960 respectively; that the average ratios for 'commercial and industrial' were 56.13% and 54.35% for those years; and that the average ratio found by the Director for all classes of real property were 49.29% in 1958 and 47.68% in 1960. These figures would buttress our belief that 40% could not be accepted as the level at which each

* Emphasis supplied by ATB.

parcel of real property would contribute its just share of the cost of government.

Rather we are satisfied the factual pattern brings the case within the holding of Kents that the average ratio for all real property is appropriate evidence of the common level to which reductions should be granted, absent other proof suggesting that the average ratio should be modified. (See Kents, supra, 34 N. J., at pp. 31-32.)"

In *Deitch Co. v. Board of Property Assess.*, 417 Pa. 213 (1965), the Court after reviewing previous decisions dealing with assessments of real estate at various percentages of fair cash value, at Page 220 of its decision said:

"From these previous decisions there emerges the principle that a taxpayer should pay no more or no less than his proportionate share of the cost of government. Implementation of this principle would require that an owner's assessment be reduced so as to conform with the common level of assessment in the taxing district. . .

Of course, the question arises as to the definition of the term 'common level'. Where the evidence shows that the assessors have applied a fixed ratio of assessed to market value throughout the taxing district, then that ratio would constitute the common level. However, where the evidence indicates that no such fixed ratio has been applied, and that ratios vary widely in the district, the average of such ratios may be considered the 'common level'. Siegal v. City of Newark, supra, at 64, 183 A. 2d at 24.[3]"

Footnote 3 of *Deitch Co.*, supra, states that, "For an extensive discussion on this point see Notes, 'Inequality in Property Tax Assessments: New Cures for an Old Ill,' 75 Harv. L. Rev. 1374 (1962)." The Board notes that said Harvard Law Review article is also cited in *Shoppers' World, Inc.*, supra, n. 7, and in *Chomerics, Inc.*, supra, n.9. See also *Rick* appeal, 402 Pa. 209 (1961); Kays, Inc. v. Board of Tax Review, City of New Haven, 365 A. 2d 1207 (1976).

In the instant appeal the parties have also stipulated (See Attachment 1, Page 5) as to the ratio of assessment to sales price of the various classes of real and personal property as follows:

Type of Property	Class **	Assessed Value *	Assessment Ratio	Estimated Full Valuation *
Real	R-1	176584	.268	658895
Real	R-2	114028	.380	300073
Real	R-3	106574	.622	171340
Real	R-4	214086	.477	448817
Real	RC	63581	.532	119513
Real	C	657110	.532	1235169
Real	I	174025	.576	302127
Real	A/H	74	1.000	74
Real	L	43399	.415	104576
	Total	1549461	.464	3340584
Estim. 1976 increase		15404	1.000	15404
Personal Certified		94345	1.000	94345
Personal Other		149667	1.000	149667
Total		1808877	.502	3,600,000

Obviously, no fixed or uniform ratio has been applied to the various classes of property enumerated above. Even within the single-family residential (R-1) category, on the basis of which the parties have agreed on a lowest class

* In thousands.
** See Exhibit A for definition of classes.

assessment/value ratio of 26.8%, the ratios within that category (See Attachment 3, Page 2) span a wide range on a ward to ward approach, from 17% and below in Wards 1 & 2 to 79.2% and above in Ward 12, as follows: Ward 12, 79.2% and above; Wards 8, 9, 67.8 - 79.1%; Ward 14, 62.0 - 67.7%; Wards 13, 15, 38.3 - 46.8%; Wards 10, 11, 16, 17, 25.6 - 38.2%; Wards 3-7, 18 - 22, 17.0 - 25.5%; Wards 1, 2, 17.0% and Below.

Were the reaching of *Seigal* [sic], supra, and *Deitch,* supra, appropriate here, then it seems to the Board that since the evidence shows the assessors have not applied a fixed or uniform ratio, and the ratios that were applied vary widely from classification to classification, and even from ward to ward within the critical class of single-family residence property, the composite average of all ratios shown by the evidence in this appeal, which said composite average is .502, could be considered as the "common level" and the appellant's assessment reduced to that "common level" in implementation of the principle that a taxpayer should pay no more or less than his proportional share of the cost of government.

The application of the lowest substantial assessment/value ratio in the facts of this appeal may likewise be violative of the Fourteenth Amendment to the Constitution of the United States. That amendment provides in part that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Equal protection of the laws requires of course that all persons in the same category and in the same circumstances be treated alike. See *Opinion of the Justices,* 332 Mass. 769, 779-780. In *Cumberland Coal Co. v. Board of Revision of Tax Assessments,* 284 U.S. 23, at Page 28, the Court said, "It is established that the intentional systematic undervaluation by state officials of taxable property of the same

class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." Conversely, it seems to the Board, that a reduction of a taxpayer's assessment to the lowest substantial assement/value ratio, when to do so would relieve the taxpayer of a part of his pro rata share of the total tax burden (See *Seigal* [sic], supra), may likewise contravene the constitutional right of others who are assessed at higher percentages of fair cash value on property within the same class as that of such taxpayer. While on the subject of the implications of the Fourteenth Amendment, we note that the equal protection clause does not bar classification of real property for local taxation. The Federal Supreme Court has declined to interfere with classified treatment whether established by the express language of State law or by "settled state practice". *Nashville, C. & St. L. R. Y. v. Browning,* 310 U.S. 362 (1940).

Despite our above-stated doubts and misgivings and our reasons therefor, and although attracted to the approach and the reasoning of *Seigal* [sic], supra, and *Deitch Co.,* supra, we nevertheless feel constrained to follow *Curtis,* supra, citing n. 10 of *Shoppers' World, Inc.,* supra, and apply the ratio pertaining to the lowest substantial class, and have done so in this appeal.

The appellee filed 19 Requests for Rulings of Law of which Requests Numbered 1, 2, 3, 4, 5, and 17 are granted; Requests Numbered 7, 8, 10, 11, 12, 15, 16, and 19 are refused; Request Numbered 6 is refused as being inapposite, too remote and speculative; Request Numbered 9 is granted as to the first clause, and refused as to the remaining two clauses; Request Numbered 18 is refused for the reason that an excessive assessment should be reduced so as to result in an assessment proportional to other assessments; and Requests Numbered 13 and 14 are

refused for the reason that the issue of the revaluation of the City is not before us.*

Our decision for the appellant was promulgated on June 30, 1978.

APPELLATE TAX BOARD

By /s/ Ruth L. Kleinfeld Chairman

A True Copy,

Attest: /s/ Richard B. Willis

Clerk of the Board

* We note that the issue of revaluation is involved in *Berman, et al.* v. *Barbara Cameron, et al.*, Suffolk Superior Court, Civil No. 23853.

SUMMARY OF IMPORTANT FACTS

RE: PROPERTY, ASSESSMENTS, AND PRACTICES ETC. IN BOSTON

	R1	R2	R3	R4	RC	C	I	AH	L	TOTAL
Number parcels each class	31,414	19,612	16,867	7,720	2,566	6,070	1,002	3	10,597	95,851

ASSESSED VALUATION

	R1	R2	R3	R4	RC	C	I	AH	L	TOTAL
1974	176,584,300	114,027,600	106,574,200	214,085,900	63,581,000	657,109,800	174,025,400	74,100	43,399,100	1,549,461,400

EQUALIZED VALUATIONS AND RATIOS

	1974	1974	1976	1976
	Equalized Valuation	Assessed Valuation	Equalized Valuation	Assessed Valuation
	2,600,000,000	1,784,200,000	3,600,000,000	1,765,000,000
RATIO				
				49%

ASSESSMENT RATIOS OF SINGLE RESIDENTIAL PROPERTIES BY WARD

WARD 12	79.2% and Above
WARDS 8, 9	67.8 - 79.1%
WARD 14	62.0 - 67.7%
WARDS 13, 15	38.3 - 46.8%
WARDS 10, 11, 16, 17	25.6 - 38.2%
WARDS 3-7, 18-22	17.0 - 25.5%
WARDS 1, 2	17.0% and Below

ANNEX "A"

1961

(1) Class	(2) Parcels	(3) Sound Value	(4) % Applied by Board	(5) Assessed Value	(6) Taxes Based on Assessments (at $64.60)	(7) Taxes based on 100% of Sound Value (at $42.15)
1 Family	22,005	$266,285,568	50%	$133,142,792	$ 8,601,024	$11,223,937
2 Family	6,980	$ 70,700,535	60%	$ 42,420,461	$ 2,740,361	$ 2,980,028
3 Family	1,339	$ 13,770,109	65%	$ 8,952,735	$ 578,352	$ 580,410
4 or more Family	1,177	$ 34,999,607	70%	$ 24,500,071	$ 1,582,703	$ 1,475,233
Sub-Total	31,501	$385,755,819		$209,016,059	$13,502,410	$16,259,608
Public Utilities, Commercial and Industrial	2,521	$174,870,514	85%	$148,641,060	$ 9,602,217	$ 7,370,792
Farms, Vacant Land and Other Real Estate	8,089	$ 18,058,125	70%	$ 12,642,662	$ 816,737	$ 761,150
Total	42,111	$578,684,458	64%	$370,299,781	$23,921,394	$24,391,550
Personal Property	(bills) 5,000	$ 36,893,760	85%	$ 31,359,700	$ 2,025,836	$ 1,555,072
Grand Total	47,111	$615,578,218	65.25%	$401,659,481	$25,947,230	$25,946,622

THE COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD
Leverett Saltonstall Building, Government Center
100 Cambridge Street, Boston, Mass. 02202

Docket No. 89209

NORMAN TREGOR, Trustee,
Appellant.

BOARD OF ASSESSORS
OF THE CITY OF BOSTON,
Appellee.

CORRECTION

In our decision in the above-entitled appeal, promulgated June 30, 1978, the assessed value of the subject property was erroneously stated to be $330,000; the correct amount of the assessed value is $320,000.

APPELLATE TAX BOARD
By /s/ Ruth L. Kleinfield
Chairman
/s/ Peter J. Allen
Member
/s/ Daniel McLean
Member
/s/ Rudolph W. Ouellette
Member
/s/ Paul A. Butler
Member
Attest /s/ Richard B. Willis
Clerk of the Board

Date: September 14, 1978
(Seal)

Supreme Court, U. S.
FILED
JUL 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1880.

BOARD OF ASSESSORS
OF THE CITY OF BOSTON,
PETITIONER,

v.

NORMAN TREGOR, TRUSTEE,
RESPONDENT.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

LAWRENCE M. SLATER, ESQ.,
ARTHUR D. ALTMAN, ESQ.,
NATHAN T. WOLK, ESQ.,
LANE & ALTMAN,
201 Devonshire Street,
Boston, Massachusetts 02110.
(617) 357-5200
Attorneys for the Respondent.

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1880.

BOARD OF ASSESSORS
OF THE CITY OF BOSTON,
PETITIONER,

v.

NORMAN TREGOR, TRUSTEE,
RESPONDENT.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Introductory Statement.

The Respondent, Norman Tregor, Trustee of Broad Street Trust, opposes the Petition of the Board of Assessors of the City of Boston for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, reported at page 770 of the 1979 Massachusetts Advance Sheets, is appended to the Petitioner's Petition as Appendix A, pp. 15 through 30, inclusive.

Jurisdiction.

The Petitioner claims jurisdiction under 28 U.S.C. § 1257. The Respondent denies that this Court has jurisdiction to grant a Writ of Certiorari thereunder as none of the requirements set forth in 28 U.S.C. § 1257(3) are present in this case.

Questions Presented.

Should the Petition for a Writ of Certiorari of the Board of Assessors of the City of Boston be denied because (i) even if a federal question were present, which there is not, the Petitioner does not have the standing to raise it, (ii) the case lacks any federal question which may be raised by the Petitioner, (iii) the decision below rests upon adequate and independent state grounds, (iv) the decision below gave full consideration to the issues presented and decided them correctly and fairly, (v) the Petitioner did not adequately raise a federal question in the forum below, and (vi) the issues involved in this case are not of national importance?

Constitutional Provisions and Statutes Involved.

As is manifestly clear from the decision of the Massachusetts Supreme Judicial Court appended to the Petition for Certiorari, Appendix A at pp. 15 through 30, inclusive, there are no issues in this case involving either the Constitution of the United States or any statutes of the United States.

Statement of the Case.

The Respondent, Norman Tregor, Trustee of the Broad Street Trust (hereinafter referred to as "Taxpayer"), during the year in question (1977) was the owner of an office building located at 33 Broad Street, in the City of Boston (hereinafter referred to as the "City"). For the fiscal year 1977, the City valued the subject property at $320,000 and assessed a tax thereon at the rate of $252.90 per thousand, or $80,828.00. The Taxpayer filed an Application for Abatement of Real Estate Taxes with the City which was deemed denied by operation of law on January 29, 1977.[1] The Taxpayer then filed a Petition Under Formal Procedure with the Appellate Tax Board of the Commonwealth of Massachusetts (the "Board") seeking an administrative resolution of his dispute with the City.[2]

Among the allegations raised by the Taxpayer before the Board in his Petition Under Formal Procedure was that Taxpayer's property was being assessed in a disproportional manner; i.e., that Taxpayer's property, which is commercial in character, was being assessed at a higher percentage of its fair cash value[3] than the City was as-

[1] Mass. G.L. c. 59, § 63.

[2] The Board is an administrative agency empowered by the Massachusetts legislature with quasi judicial powers to hear disputes involving the imposition of state and local taxes in the Commonwealth of Massachusetts. *See* Mass. G.L. c. 58A, § 1 et seq.

[3] Massachusetts assessors are under a mandate to assess real and personal property at its "fair cash valuation," Mass. G.L. c. 59,

sessing residential property. The City did not file any answer to the Taxpayer's Petition Under Formal Procedure, and, accordingly, the City, by law, admitted the foregoing allegations of disproportional assessment.[4]

The Board heard the Taxpayer's Petition Under Formal Procedure in two phases. The first phase dealt solely with the issue of the fair cash value of the Taxpayer's property. The parties stipulated that the Board would determine the fair cash value according to a formula based upon the capitalization of income method of valuation. Pursuant to said stipulation, the Board found that the fair cash value of the subject property for the year in issue was $328,000. This result is not now in issue.

The second phase of the hearing before the Board dealt with the issue of the remedy to be afforded to the Taxpayer, the City having admitted by Stipulation and by pleading that it had been assessing commercial property, including that of Taxpayer, at a higher percentage of fair cash value than single family dwelling units which was stipulated to be a substantial class of real property in the City and was referred to as the "lowest substantial class." The City and the Taxpayer stipulated that the ratio of assessment to fair cash value of the lowest substantial class for the year in issue was 26.8%. The Stipulation of the parties is set forth as Appendix A, pp. 14 through 21 (hereinafter referred to as the "Stipulation").

In the Stipulation the City and the Taxpayer further agreed that for the year in issue the average ratio of as-

§ 38, which is defined to mean "the price that an owner willing but not compelled to sell ought to receive from one willing but not compelled to buy." *Assessors of Quincy* v. *Boston Consolidated Gas Co.*, 309 Mass. 60, 63 (1941).

[4] Mass. G.L. c. 58A, § 7.

sessments to estimated fair cash value for all real and personal property located in the City was 50.2%.

Taxpayer argued that the assessment on his property should be reduced so that he would be taxed "proportionally" and would pay only his "fair share" as mandated respectively by the Constitution of the Commonwealth of Massachusetts (Pt. II, c. 1, § 1, Article 4; Article 10 of the Declaration of Rights). The Taxpayer further argued that the Massachusetts Constitution and Declaration of Rights afforded him a remedy and that this remedy, following prior decisions of the Supreme Judicial Court of Massachusetts, required that the Taxpayer has the right to have his assessment reduced to 26.8% of the fair cash value of Taxpayer's property — the same percentage of fair cash value as the assessment attributable to the lowest substantial class. The City conceded that the Taxpayer was entitled to a remedy but urged that the Taxpayer's assessment only be reduced to the City-wide average, or 50.2%. The City's arguments both before the Board and the Supreme Judicial Court were based on its own interpretation of the Massachusetts Constitution and on public policy arguments chiefly related to alleged economic impact on the City. All of the City's arguments, both before the Board and the Supreme Judicial Court were stated in the City's Brief submitted to the Supreme Judicial Court. A section of the City's Brief submitted to the Supreme Judicial Court containing all of the City's arguments and entitled Summary of the Argument is annexed as Appendix B at pp. 22 through 23, inclusive.

On June 30, 1978, the Board issued its Decision wherein the Board found as follows:

"Decision for the appellant. Assessed value $330,000.[5] Fair Cash Value as found by the board is $327,771, rounded to $328,000. The Disproportionate Assessment is 26.8%. The ultimate value is $87,904."

In the Memorandum which accompanied the Decision the Board stated:

"The 'appropriate theory of law,' in the opinion of the board, is that petitioner's assessment should be reduced to reflect the assessment/value ratio of the lowest substantial class. See *Board of Assessors of Weymouth* v. *Thomas E. Curtis & others, Trustees,* [Mass. Adv. Sh. (1978) 1676]; *Shoppers' World, Inc.* v. *Board of Assessors of Framingham,* 348 Mass. 366 at 377-378 n. 10."

On appeal, the Supreme Judicial Court affirmed the Board's Decision and applied the 26.8% ratio. Citing earlier Supreme Judicial Court decisions in *Assessors of Weymouth* v. *Curtis,* Mass. Adv. Sh. (1978) 1676 and *Kavet* v. *Board of Assessors of Watertown,* Mass. Adv. Sh. (1978) 2174, the Supreme Judicial Court said:

"Pursuant to the Constitution, our statutes require assessors to assess property at its 'fair cash valuation.' G.L. c. 59, § 38. Cf. G.L. c. 41, § 29 (assessors' oath). But 'illegal assessments have long been the rule rather than the exception throughout much of the Commonwealth.' *Sudbury* v. *Commissioner of Corps. & Taxation,* 366 Mass. 558, 563 (1974), and cases cited." Mass. Adv. Sh. (1979) at 773.

* * *

"The city does not now dispute the fact that the taxpayer is aggrieved by a disproportionate assessment. It contends only that the appropriate remedy is reduction of the taxpayer's assessment to a level proportional to the average of assessments of all classes of property through the city." *Id.* at 774.

[5] This figure was later corrected by the Board to $320,000.

* * *

"Use of the municipal average reduces the discrimination between those who do and those who do not seek abatements. But such discrimination is inherent in the abatement procedure, and the use of the municipal average affords only partial equalization between the favored taxpayer and the disfavored taxpayer. Suppose, for example, four taxpayers with properties of equal value. Two are residential and are unlawfully assessed at 25% of that value; two are commercial and are unlawfully assessed at 75%. A comprehensive remedy would reassess all at 100%; reassessment of all at the 50% average would produce the same tax, in the absence of some exemption. If one of the commercial taxpayers is granted an abatement to 50%, he is treated better than the other, but he is still a victim of discrimination in favor of residential property." *Id.* at 781.

Reasons for Denying the Writ.

1. The Petitioner Has No Standing to Raise a Federal Question, If, *Arguendo,* One Exists.

Even if a federal question were present in the instant case, which there is not (see argument No. 2 *infra*), the City has no standing to raise it. The City is not an aggrieved taxpayer. The City is not a member of any class allegedly discriminated against by state action. *Cf. Sioux City Bridge Co.* v. *Dakota County, Nebraska,* 260 U.S. 441 (1923). The reverse is true. It is the City, it-

self, which has wronged its taxpayer-residents and has created the conditions which necessitated the bringing of this case by Taxpayer. The Massachusetts Supreme Judicial Court's decision, below, is an attempt to right once and for all the wrongs perpetrated by the City on its taxpayers. The Taxpayer respectfully suggests that this Petition is motivated not by any concern which the City feels for its taxpayers, but is patently interposed for political reasons. The City seeks to limit the Taxpayer's remedy to a reduction in assessment to 50.2% of fair cash value which approximates the City-wide average assessment ratio. The City appears to argue in its Petition that those taxpayers whose properties are assessed above 26.8% of fair cash value will be denied equal protection, as they will be assessed in subsequent years, in part, to provide the funds which will be used to reimburse the Taxpayer. This argument ignores what is self-evident — that these taxpayers would, themselves, seek abatements of their real estate taxes based upon a lowering of their assessment to 26.8% rather than 50.2%. By its argument, the City does not redress the wrongs to these taxpayers; rather it compounds the wrongs by perpetuating them. The remedy which the Supreme Judicial Court granted in this case is a device for putting all taxpayers on an equal level. The remedy which the City seeks serves as an inducement to the City to continue to assess in a non-uniform manner, as those taxpayers whose properties are assessed above 26.8% but below 50.2% will never be entitled to any relief. The City cannot and does not speak for these aggrieved taxpayers but merely for itself.

2. The Case Lacks Any Federal Question Which May Be Raised by the Petitioner.

The Petitioner's argument, simply stated, appears to be that the remedy granted to the Taxpayer by the Supreme Judicial Court of Massachusetts denies equal protection to those taxpayers of the City not applying for an abatement for the year in issue who were assessed at a percentage of fair cash value above 26.8% because they will be disproportionately assessed in relation to the lowest substantial class (and Taxpayer after his abatement to 26.8%). The result of this, the City argues, is that these taxpayers will wind up paying higher real estate taxes in subsequent years to pay in part for the tax abatement refund granted to Taxpayer. The Petitioner's argument ignores the facts that (i) all other similarly situated taxpayers need only, themselves, apply for an abatement pursuant to the established procedures under Mass. G.L. c. 59, § 59; i.e., the "class" the Petitioner says is being denied equal protection may have the benefit of the Supreme Judicial Court's decision below merely by seeking to enforce a legal right available to all — filing at no cost a simple application with the City and (ii) as was rightly found by the Supreme Judicial Court, failure to reduce Taxpayer's assessment to 26.8% would only result in continued discrimination against Taxpayer and other taxpayers owning property assessed by the City at a ratio above the lowest substantial class. The City is silent as to what percentage it would urge as a remedy if every taxpayer being disproportionally assessed applied for an abatement. The relief given should be the same irrespective of the number of taxpayers making application for relief. If all those assessed above 26.8% of fair cash value petitioned for their just relief, the only remedy would be to lower everyone's assessment to the level of the lowest substantial class, thereby taxing everyone uniformly as mandated by the Constitution of the Commonwealth of Massachusetts.

The Petitioner also appears to argue that there is a federal question present in the instant case, simply be-

cause both in this case and in the case of *Sioux City Bridge Co.* v. *Dakota County, Nebraska,* 260 U.S. 441 (1923) a taxpayer sought a remedy on the basis of disproportional assessments. The *Sioux City Bridge Co.* case granted relief to the complaining taxpayer who was not afforded equal protection under the law. In the present case, the complaining Taxpayer was granted relief so as to conform with the principle "that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law." *Id.* at 446. Thus, the decision of the Supreme Judicial Court in the instant case comports with the *Sioux City Bridge Co.* decision.

3. The Decision of the Supreme Judicial Court Rests upon Adequate and Independent State Grounds.

The decision of the Supreme Judicial Court clearly rests on State constitutional and statutory grounds. The Supreme Judicial Court's decision, following its earlier decisions,[6] is an attempt to clarify certain sections of the Constitution of the Commonwealth of Massachusetts, the Massachusetts Declaration of Rights and Mass. G.L. c. 59, § 38. No mention of any federal statute or the Constitution of the United States (other than indirectly through a reference to the *Sioux City Bridge Co.* decision) is made in the Supreme Judicial Court's decision, and, indeed, none was necessary, as there are adequate and independent state grounds which formed the basis of the decision. The City's Petition should, therefore, be denied. *See, e.g., Evans* v. *Abney,* 396 U.S. 435 (1970).

[6] *See, e.g., Board of Assessors of Weymouth* v. *Curtis,* Mass. Adv. Sh. (1978) 1676; *Kavet* v. *Board of Assessors of Watertown,* Mass. Adv. Sh. (1978) 2174; *Shoppers' World, Inc.* v. *Board of Assessors of Framingham,* 348 Mass. 366 (1965).

4. The Decision of the Supreme Judicial Court Was Proper, Based upon All of the Evidence and Reached a Fair Result.

The City in this case admitted and stipulated that it had been assessing property in the City for the year in issue and for many years prior thereto in an illegal, discriminatory and disproportional manner. The City further stipulated that there was a favored class of taxpayers, comprising the owners of single family residences, which was being assessed at 26.8% of fair cash value in contrast to commercial property owners, such as Taxpayer, who were being assessed at ratios much higher than 26.8%. This practice violated not only the Constitution of the Commonwealth of Massachusetts, the assessors' oaths of office and statutory mandates, but was also in direct and knowing contravention of a 1974 order of the Supreme Judicial Court in *Town of Sudbury* v. *Commissioner of Corporations and Taxation,* 366 Mass. 558 (1974). In affirming the Board's Decision abating Taxpayer's assessment to 26.8% of fair cash value, the Supreme Judicial Court was following its own established precedents[7] and was, further, effectively eliminating assessing inequalities by making it clear that all taxpayers are now entitled to be assessed uniformly and equally. To have adopted the City's ratio of 50.2% would have continued the illegal system of properties taxed by the City at different percentages of fair cash value. The Supreme Judicial Court rightly found that this is contrary to the Constitution and laws of the Commonwealth of Massachusetts. Further, even if the City's argument had been adopted by the Supreme Judicial Court, the very next year, Taxpayer would have been eligible to reapply for an abatement based upon the inequality between 50.2% and 26.8%, and

[7] Cases cited note 6, *supra.*

so on each year, until the Taxpayer's assessment was at or very near 26.8%. Thus the Supreme Judicial Court's decision eliminates the expense and time both for taxpayers and the Commonwealth's agencies and judiciary entailed in yearly appeals, by establishing the correct standard of relief upon the initial appeal.

5. The City Did Not Adequately Raise a Federal Question in the Court Below.

As can be seen from the Summary of the City's Argument in its Brief submitted to the Supreme Judicial Court, Appendix B at pp. 22-23, the questions raised below by the City either dealt with Massachusetts constitutional provisions, Massachusetts statutory law or public policy considerations within the lower Court's general equity jurisdiction. As the City did not raise any Fourteenth Amendment question or other federal question in the Court below, the City has waived its right to do so now. *See, e.g., Street* v. *New York,* 394 U.S. 576 (1969). This Court has jurisdiction to review the decision of the Supreme Judicial Court only if a federal ground was the sole basis of that decision or the Massachusetts Constitution was interpreted under what the Supreme Judicial Court deemed the compulsion of the Federal Constitution. *Mental Hygiene Dept. of California* v. *Kirchner,* 380 U.S. 194, 198 (1965).

6. The Issues Involved in This Case Are Not of National Importance.

The instant case involves a system of real estate taxation unique to Massachusetts as mandated by Massachusetts law and the Constitution of the Commonwealth of Massachusetts. It is true, as Petitioner states, that other states have also grappled with similar problems

of disproportional assessment. The constitutional and statutory provisions applicable in those states differ from those appertaining in Massachusetts. This Court has stated that a state's highest court is the best judge as to the interpretation of the state's constitution and statutes. *See, e.g., Albertson* v. *Millard,* 345 U.S. 242 (1953).

Conclusion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LAWRENCE M. SLATER, ESQ.,
ARTHUR D. ALTMAN, ESQ.,
NATHAN T. WOLK, ESQ.,
LANE & ALTMAN,
201 Devonshire Street,
Boston, Massachusetts 02110.
(617) 357-5200
Attorneys for the Respondent.

Appendix A.

THE COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

STIPULATION

Now come the parties in the above-entitled action and for the purposes of the consolidated trial before the Appellate Tax Board of these causes only, stipulate to the following facts, but subject always to Paragraph 4 hereof;

1.

The fair cash values of all real and personal property on the City of Boston subject to taxation in the City of Boston for each years 1970 through 1976 inclusive is as follows:

January 1, 1976	3.6 Billion
January 1, 1975	3.1 Billion
January 1, 1974	2.6 Billion
January 1, 1973	2.35 Billion
January 1, 1972	2.1 Billion
January 1, 1971	2.05 Billion
January 1, 1970	2.0 Billion

The fair cash value for all real or personal property in the even-numbered years — 1970, 1972, 1974 and 1976 were found by the Appellate Tax Board after an adversary hearing after a tax equalization proceeding held pursuant to the applicable statute. The values for the years 1971, 1973 and 1975, were arrived at by taking a median value of the two even-numbered years immediately preceding and following the year in question.

2.

The assessed values of all personal and real property of the City of Boston for each year is as follows:

Fiscal year 1977	1,765,000,000
Fiscal year 1976	1,793,473,000
Fiscal year 1975	1,784,200,000
½ year (start of Fiscal year) 1974	1,784,200,000
Calendar year 1973	1,742,200,000
Calendar year 1972	1,715,700,000
Calendar year 1971	1,681,500,000
Calendar year 1970	1,617,000,000

3.

The amount of the revenue raised by the property tax of the City of Boston for each of the years here involved is as follows:

Calendar year 1970	253,545,600
Calendar year 1971	293,758,050
Calendar year 1972	337,478,190
Calendar year 1973	342,690,740
½ year (start of Fiscal year) 1974	175,565,280
Fiscal year 1975	350,952,140
Fiscal year 1976	352,776,130
Fiscal year 1977	446,386,500

4.

If the hypothetical tax rate referred to in appellee's theory of law is determined by dividing the amount to be raised by the fair cash value of the City as stipulated in

Paragraph 1, then the hypothetical tax rates for the City for the years in question are as follows:

	Tax Levy	÷	Fair Cash Value	=	Tax Rate
FY 1977	446,386,500	÷	3.6 Billion	=	124.00
FY 1976	352,776,130	÷	3.1 Billion	=	113.80
FY 1974-75	350,952,140	÷	2.6 Billion	=	134.98
C 1973	342,690,740	÷	2.35 Billion	=	145.83
C 1972	337,478,190	÷	2.1 Billion	=	160.70
C 1971	293,758,050	÷	2.05 Billion	=	143.30
C 1970	253,545,600	÷	2.0 Billion	=	126.77

5.

The Commissioner of Corporations and Taxation, in only one year, 1976, determined the ratio of assessments to sale prices of various classes of real and personal property as follows:

Type of Property	Class **	Assessed Value *	Assessment Ratio	Estimated Full Valuation *
Real	R-1	176584	.268	658895
Real	R-2	114028	.380	300073
Real	R-3	106574	.622	171340
Real	R-4	214086	.477	448817
Real	RC	63581	.532	119513
Real	C	657110	.532	1235169
Real	I	174025	.576	302127
Real	A/H	74	1.000	74
Real	L	43399	.415	104576
	Total	1549461	.464	3340584

* in thousands
** See Exhibit A for definition of classes.

Type of Property	Class **	Assessed Value *	Assessment Ratio	Estimated Full Valuation *
Estim. 1976 increase		15404	1.000	15404
Personal Certified		94345	1.000	94345
Personal Other		149667	1.000	149667
Total		1808877	.502	3,600,000

* in thousands
** See Exhibit A for definition of classes.

For purposes of the above-named consolidated trial only, the parties stipulate and agree that the 1976 ratio of assessments to sale prices of various classes of property as reported by the Commissioner of Corporations and Taxation may apply with equal force in the years of 1970 through 1975 and 1977 inclusive.

6.

Petitioners do not stipulate that the facts set forth in Paragraphs 1 to 5, inclusive, are admissible, and specifically Petitioners object to the admissibility of such facts on the grounds of relevancy and materiality only. This Stipulation has been entered into by the Petitioners solely as a convenience to the City of Boston and the Appellate Tax Board to avoid lengthy time consuming hearings relating to facts which the Petitioners believe to be inadmissible on the grounds of relevancy and materiality. The facts stipulated are to be used, if admissible, solely with reference to the following legal issues raised by the City of Boston but denied by Petitioners:

I. That if the appropriate law is that the appellants' assessment should be reduced to reflect the assessment/value ratio of the lowest substantial class, the ratio of the lowest substantial class should be computed as the ratio of assessed value to fair cash value of the lowest substantial class after

that value has been adjusted because of the impact of additional taxes which would be imposed on that class if all property were assessed at fair cash value. The appellee claims that the assessment value/ratio is as set forth in Exhibit B which will be proved at trial.

II. That the appropriate procedure to compute an abatement is to determine the hypothetical tax rate if all property were assessed at fair cash value and apply that rate to fair cash value of the property as found by the Board and if this is the appropriate theory then the petitioners are entitled to an abatement equal to the difference between the tax paid and that which would have been paid if all property were assessed at fair cash value.

7.

The parties stipulate for all years in issue; namely, 1970 through 1977, inclusive, (i) that there were substantial classes of real property in the City of Boston assessed at varying percentages of fair cash value, and (ii) that there was a substantial class of real property in the City of Boston which was assessed at 26.8 percent of fair cash value. Only if the appropriate theory of law is that the petitioners' assessments should be reduced to reflect the assessment/value ratio of the lowest substantial class, this percentage, namely, 26.8 percent, should be applied to the Appellate Tax Board's determination of fair cash value for the years in issue in order to determine the assessed valuation of the Petitioners' property for the years in issue. The parties further stipulate that all other facts necessary in order to legally apply such percentage of 26.8 percent to the fair cash value in order to get the proper assessed value shall be deemed to have been proven by the petitioners.

The appellee objects to the relevancy and materiality of all the facts stipulated in this paragraph for the purposes

of computing an assessment/value ratio as set forth in this paragraph. However, if the Board shall find them relevant and material, they may be used for any purpose.

8.

Nothing contained in this stipulation shall preclude the Appellate Tax Board from making such findings as it deems necessary or proper based on all of the evidence presented at the trial of this action.

/s/ Arthur D. Altman
Attorney for all the petitioners

/s/ Walter H. McLaughlin
Special counsel for the City of Boston

Exhibit A

December 21, 1973

DEPARTMENT OF CORPORATIONS AND TAXATION
100 Cambridge Street, Boston, Massachusetts 02204

THE CLASSIFICATION SYSTEM REQUIRED TO BE USED BY JULY 1, 1974 TO IDENTIFY ALL PROPERTY SHOWN IN EACH CITY AND TOWN'S VALUATION BOOK.

A total valuation of each class must be shown at the end of the valuation book. (Chapter 671, Acts of 1973)

Choice of designation to be used in identifying each piece of property in the valuation book and in the sales reports

Class of Property	submitted under General Laws, Chapter 58, section 10. (use symbols of only one column)	
Residential — single dwelling unit	R1	or 1
Residential — double dwelling units	R2	2
Residential — triple dwelling units	R3	3
Residential — four dwelling units or more	R4	4
Residential/Commercial [1]	RC	5
Commercial [2]	C	6
Industrial [3]	I	7
Classified Agricultural/Horticultural land [4]	AH	8
Other Vacant Land	L	9

1. Residential/Commercial — Commercial property containing one or more dwelling units.
2. Commercial — Property used for retail, service, professional and similar activities.
3. Industrial — Property used for manufacturing, wholesaling and warehousing operations. Also special purpose structures such as fuel storage areas, power plants and telephone exchange buildings.
4. Classified Agricultural/Horticultural Land — Land for which the present use assessment provisions of Chapter 1118 of the Acts of 1973 applies.

Exhibit B

Step 1 — Actual tax levy on R1 properties by the City of Boston in FY 1977:

Total Assessed Value	x	Actual Tax Rate	=	Tax Levy
176,584,000		252.9		44,658,093

Step 2 — Tax Levy on R1 properties if they were assessed at full valuation in accordance with Exhibit #4 and were taxed according to the rate set forth for fiscal year 1977 in accordance with Exhibit #5:

Full Valuation	x	Tax Rate	=	Tax Levy
658,895,000		124.00		81,702,980

Step 3 — The difference between the taxes in Step 1 and Step 2:

$81,702,980
44,658,093
37,044,887

Step 4 — Expert evidence will be presented that the imposition of $1.00 in additional taxes on residential property will depreciate the value of that property by $10.00. Based on that assumption, the addition of taxes in Step 3 will cause a reduction in value of:

$37,044,887 x $10 = $370,448,870

Step 5 — The difference between Step 4 and the full valuation of R1's as set forth in Exhibit 4:

$658,895,000
370,448,870
288,446,130

Step 6 — The adjusted full valuation in Step 4 as a ratio of actual assessed values:

176,584,000 ÷ 288,446,130 = 61.2 percent

Appendix B.

SUMMARY OF THE ARGUMENT.

[from the Brief of the Board of Assessors of the City of Boston submitted below in Supreme Judicial Court No. 1615]

Because of the factual posture of this appeal, the parties have presented a clearly defined issue for the Court's review — an issue upon which the Court has commented but never ruled. The parties agree that property in the City is assessed below fair cash value. They also agree that the lowest substantial class of property subject to tax is assessed at 26.8% of it fair cash value. The Board has found that the common level of assessments for all taxable property is 50.2% of its fair cash value. The controversy concerns which percentage shall be applied to Tregor's fair cash value in calculating his abatement.

The City approaches this issue on several levels. First, the City argues that Article 10 of the Constitution of Massachusetts compels the use of the 50.2% figure. (p. 22) A fundamental requirement of the Constitution is that all property must be taxed proportionately. The only means of achieving proportionality is through the use of a common level of assessments. (p. 26) Thus, taxpayers will bear only their fair share of the tax burden.

Dicta in prior opinions can be read to indicate a partiality for selecting the lowest class theory of 26.8%. (p. 27) However, the City submits that the Court's language in the *Shoppers' World* and *Weymouth* cases, *supra,* which gave rise to an indication of support for the lowest class theory, is not controlling. (p. 27, 42) The Court has never been presented with a factual situation requiring a selection between the lowest class theory or the average class theory. (p. 32, 44) Thus, this language was dicta in those

cases and it should be disregarded in favor of the average class theory.

The decisions mentioned above have placed Massachusetts in a unique position. Leading decisions in other jurisdictions support the City's contention. (p. 55) Where equality, uniformity, and proportionality among taxpayers is required by constitutions or statutes, the means of achieving those ends are through the use of an average class theory. In cases where the lowest class theory was advanced, it was rejected by the courts. (p. 61) The decision of the Appeals Court in the *Chomerics* case, *infra,* reflects favorably on these decisions as being the better rule of law to achieve constitutionally imposed proportionality. (p. 51)

From an equitable standpoint, the adoption of the average class theory is the clearly preferred remedy. (p. 70) The City has already outlined the testimony of numerous witnesses who have accurately detailed the economic dislocation which would result from the implementation of a lowest class theory. In contrast, the only conceivable benefit to be derived from the lowest class theory is punishment. However, the punishment falls upon the wrong persons, serves no rational purpose, and produces the very result this Court has said the [Massachusetts] Constitution forbids. (p. 73)

In light of the [Massachusetts] Constitution, the law in other jurisdictions, and the overwhelming policy objectives, this Court must conclude that the Board erred in selecting the ratio of assessed value to fair cash value of the lowest substantial class as the basis for calculating Tregor's abatement.